

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

PAN AMERICAN AIRWAYS CORP.,

Plaintiff/Counter-Defendant

v.

ROBERT E. BARNES

Defendant/Counter-Plaintiff

Case No. 04-CV-10515JLT

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR
PARTIAL SUMMARY JUDGMENT ON COUNTS I AND II OF PLAINTIFF'S
SECOND AMENDED COMPLAINT.**

STATEMENT OF FACTS

Defendant has moved pursuant to Fed. R. Civ. P. 56(c) and Local Rule 56.1, to grant partial summary judgment for the Defendant on Counts I and II of Plaintiff's second amended complaint. The motion for partial summary judgment is supported by this Memorandum of Law and Defendant's Statement of Undisputed Facts. In Count I of its second amended complaint which is not a verified complaint, Plaintiff alleges negligent damage to property. Complaint, ¶¶ 10-13. Count II alleges negligent supervision. Complaint, ¶¶ 22-25. Discovery is complete and Plaintiff had the opportunity to discover facts needed to support its allegations. Court Order 11/02/04. Plaintiff itself determines Airworthiness of its Engines and Aircraft. ("Hubbard

Deposition” , 26). During Mr. Barnes employment with Pan American Airways and after Mr. Barnes left Plaintiff’s employment, Plaintiff had found its aircraft and engines to be airworthy. (Hubbard Deposition, 25, Exhibit Two, Exhibit B ¶ 5.

ARGUMENT

Plaintiff, Pan American Airways, Inc. (PanAm) in its second amended complaint alleges “negligence”, but fails to substantiate its claim by showing any of the required elements required to prove negligence.

To prevail on its claim of negligence, Plaintiff needs to prove the Defendant had a duty to the Plaintiff, that he breached that duty, and that the breach was the proximate cause of damage to the Plaintiff.

If Plaintiff fails to satisfy only one required element, the claim must fail. see *Kourouvachis v. General Motors Corp.*, 410 Mass. 706, 710 (1991), citing *Ceiotex Corp. v. Catrett*, 477 U.S. 323 (1986), “A complete failure of proof concerning an essential element of the non-moving party’s case renders all other facts immaterial and mandates summary judgment in favor of the moving party.”

Mr. Barnes, as Vice President of Maintenance, was under no duty to perform any maintenance on any aircraft or aircraft engines. Mr. Barnes, as Vice President of Maintenance, was under no duty to inspect himself any aircraft or engines. (Pan Am Deposition 14,19)

The required showing of the element of duty to the Plaintiff is not satisfied, and thus Plaintiff’s negligence claim must fail.

At all relevant times Mr. Barnes, reported to David Fink, president and Chief Executive Officer of Pan American Airways. (Id. 8, 14,15) Under the doctrine of respondeat superior and chain of command, as it existed at the time of Mr. Barnes employment with Plaintiff,

Mr. Barnes could not have been negligent or negligently supervised his staff and caused damage to Plaintiff's property without his superior, Mr. Fink, negligently supervising the Defendant. All maintenance was performed by mechanics, supervised by lead mechanics, inspectors by inspectors and the Chief Inspector, reported to the Director of Maintenance and the Managing Director of Technical Operations before reports would finally reach the Defendant.

Plaintiff has not identified anyone, other than the Defendant, as having been negligent. As shown above, Defendant had no duty to perform maintenance himself, therefore was not negligent himself, and without any negligent action by anyone reporting to Mr. Barnes, there could not have been any negligent supervision by the Defendant.

"A claim for negligent supervision may arise when an employer fails to exercise ordinary care in supervising the employment relationship to prevent the foreseeable misconduct of an employee from causing harm to other employees or third persons." *Nelson v. Gillette*, 1997 ND 205, 39, 571 N.W.2d 332. "Because the claim is based on negligence principles, the plaintiff has the burden of demonstrating a duty, breach of that duty, causation, and damages." *Id.*

As the Defendant, Mr. Barnes, had no duty to perform any maintenance himself, and as Plaintiff determined that no one reporting to Mr. Barnes had negligently performed his or her duty to inspect and maintain aircraft and engines, Plaintiff's negligence claims must fail.

CONCLUSION

For the reasons stated and based on the law set forth above, Defendant's motion for partial summary judgment on Counts I and II of Plaintiff's second amended complaint, and such other relief this court deems just and proper, should be granted in Defendant's favor.

September 20, 2005

Respectfully submitted,

Dated: September 20, 2005

A handwritten signature in black ink that reads "Peter Piel". The signature is written in a cursive style with a horizontal line underneath it.

Peter Piel
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Certificate of Service

I, Peter Piel, hereby certify that a true copy of the above document was served upon Robe Culliford, the attorney of record for the plaintiff, by U.S. mail, postage prepaid on this 20 day of September 2005.

Peter Piel

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